Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of	)	**MM Docket No. 94-71**
	)	
SANTA MONICA COMMUNITY COLLEGE DISTRICT	)	**File No. BPED-920305ME**
	)	
For a Construction Permit for a New Noncommercial FM Station on Channel 201B at Mojave, California	)	

To: The Honorable Joseph Stirmer

MOTION TO GRANT PENDING APPLICATION

Santa Monica Community College District ("SMCCD") hereby moves for an order granting its pending application forthwith. Such a grant is required by applicable law and policy as well as the Presiding Judge's Memorandum Opinion and Order, FCC 94M-543 (ALJ July 25, 1994). In support of that conclusion, the following is stated:

1. By order released on June 27, 1994, SMCCD's application was designated for hearing with a then-pending mutually exclusive application filed by Living Way Ministries ("Living Way"). Santa Monica Community College District, Reference No. 43638 (MMB June 27, 1994).

2. On July 1, 1994, SMCCD and Living Way filed a Joint Petition for Approval of Settlement Agreement which contemplated (a) the filing of an amendment by SMCCD to remove the conflict between its application and Living Way's application and (b) the grant of both SMCCD's amended application and Living Way's application. On July 5, 1994, SMCCD filed a Petition for Leave to Amend requesting acceptance of the amendment (proposing to

operate on Channel 201B in lieu of Channel 204B) contemplated by the parties' Settlement Agreement.

3. On July 25, 1994, the Commission released the Presiding Judge's Memorandum Opinion and Order which (a) granted and approved the Settlement Agreement, (b) granted SMCCD's Petition for Leave to Amend and accepted the amendment changing the channel of SMCCD's proposed operation, (c) granted Living Way's application, and (d) ordered that SMCCD's application remain in hearing "pending receipt of a no hazard determination by the FAA regarding its amended proposal," with the understanding that SMCCD's "application will be granted at that time."[1]

4. Under Commission rules, the Presiding Judge's Memorandum Opinion and Order was deemed to have been placed on Public Notice on the date on which the document was released -- July 25, 1994. 47 C.F.R. § 1.4(b)(2). By definition, then, the entire public was placed on constructive notice of the Memorandum Opinion and Order (and the Presiding Judge's acceptance of SMCCD's amendment and the grant of the parties' Settlement Agreement) on July 25, 1994. There is nothing in the Commission rules that required Public Notice to be provided through any other means.[2]

5. Under applicable law and Commission rules, the Memorandum Opinion and Order became "final" -- meaning that it is

---

[1]SMCCD filed the FAA's no hazard determination on September 1, 1994.

[2]It bears noting that Section 1.4(a) of the Commission rules expressly states that the purpose of Section 1.4 "is to detail the method for computing the amount of time within which persons or entities must act in response to deadlines established by the Commission."

no longer subject to reconsideration or review by the Commission or any court -- on September 3, 1994. 47 C.F.R. §§ 1.4, 1.113, 1.117, 1.294; 47 U.S.C. § 405(a).

6. Unbeknownst to the Presiding Judge and the parties, California State University at Long Beach ("CSU") had filed an application on July 13, 1994 to modify the facilities of KLON-FM in Long Beach, California. CSU's proposed modification of KLON-FM appears to conflict from an engineering perspective with SMCCD's amendment, which was an integral part of the Settlement Agreement approved and granted by the Presiding Judge in his Memorandum Opinion and Order. However, CSU's modification application was not placed on Public Notice until July 21, 1994 -- the very day on which the Memorandum Opinion and Order was adopted.

7. As a member of the public, CSU was given constructive notice of SMCCD's amendment and the parties' Settlement Agreement on July 25, 1994 -- the date on which the Memorandum Opinion and Order was released. 47 C.F.R. § 1.4(b)(2).

8. On August 22, 1994, CSU received actual notice of SMCCD's amendment and the Presiding Judge's grant of the parties' Settlement Agreement. On that latter date, SMCCD served CSU with an Informal Objection to CSU's modification application for KLON. See Date-Stamped Copy of SMCCD's Informal Objection attached to CSU's Petition for Leave to Intervene (Sept. 7, 1994).

9. CSU was thus in a position to take timely action which could have, if deemed meritorious and acted on by the Presiding Judge, prevented the Presiding Judge's approval of SMCCD's amendment and the Settlement Agreement from becoming final. As

an example, if CSU had filed a petition for leave to intervene or other protest on August 25, 1994 (or at any other date prior to September 3, 1994), the Commission would have been in a position (to the extent there was any merit to CSU's argument) to rescind the Presiding Judge's approval of SMCCD's amendment and the grant of the Settlement Agreement before that grant and approval became final.

10. CSU did not take any timely action. Instead, CSU waited until September 7, 1994 -- four (4) days after the Presiding Jude's acceptance of SMCCD's amendment and approval of the Settlement Agreement had become final -- to file a Petition for Leave to Intervene. At that juncture, the Presiding Judge -- as well as the Commission itself -- had been rendered legally powerless to rescind the approval and grant of the Settlement Agreement.

11. By Order released on November 7, 1994, the Presiding Judge denied CSU's Petition for Leave to Intervene because CSU's modification application for KLON-FM had not been processed by the Mass Media Bureau and consolidated with SMCCD's application. Santa Monica Community College District, FCC 94M-607 (ALJ November 7, 1994). The Order also dismissed Living Way's opposition to CSU's Petition for Leave to Intervene because Living Way was "no longer a party to this proceeding and not entitled to file pleadings herein." Order at n.1. In other words, the Order, by its own terms, recognized that the grant of Living Way's application had become final and that Living Way no longer had a legally cognizable interest to protect (as it would have if CSU's petition had been filed earlier and proposed the

rescission of his prior approval of the parties' Settlement Agreement).

12. Under Section 1.301(a) of the Commission's rules, CSU had a right to appeal the Presiding Judge's denial of its Petition for Leave to Intervene. 47 C.F.R. § 1.301(a). CSU did not take any appeal from the decision. Hence, the decision has become final, and CSU has no potential right to participate in the instant proceeding.

13. The record in the instant proceeding now includes only SMCCD's application. There is no impediment in the present record to preclude a grant of SMCCD's application. The Presiding Judge has no obligation to reconcile any grant of SMCCD's application with CSU's application, which has not been processed by the Mass Media Bureau and, in any event, is not a part of the record of the instant proceeding. A grant of SMCCD's application, moreover, would be fully consistent with Commission rules and policies. 47 C.F.R. § 73.3522(b) (unlike pre-designation amendments, a post-designation amendment proposing a "major change" can be granted upon a showing of "good cause" without return to the processing line); Las Americas Communications, Inc., 5 FCC Rcd 1634, 1637-38 (1990) (subsequent history omitted) (applicant's proposed change in community of license accepted in order to facilitate settlement after issuance of the HDO even though such change would have resulted in applicant's return to the processing line if embodied within a pre-designation amendment).

14. The Presiding Judge does not have authority to change Commission rules or Commission policies interpreting those rules. Hence, if the Presiding Judge does not grant SMCCD's application, then, in the alternative, it is respectfully requested that the Presiding Judge certify to the Commission the question whether SMCCD's application should be granted on the basis of the present record. See 47 C.F.R. § 0.341(c) (administrative law judge is authorized to certify matters to the Commission).

WHEREFORE, in view of the foregoing, it is respectfully requested that SMCCD's application be granted forthwith or, in the alternative, that the Presiding Judge certify to the Commission the question whether SMCCD's application should be granted forthwith.

Respectfully submitted,

KECK, MAHIN & CATE
1201 New York Avenue, N.W.
Washington, D.C. 20005-3919
(202) 789-3400

Attorneys for Santa Monica
Community College District

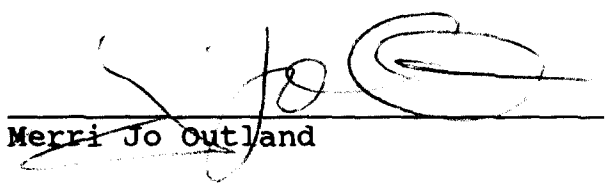
By: Lewis J. Paper

CERTIFICATE OF SERVICE

I, Merri Jo Outland, hereby certify that on this 2nd day of May, 1995, a copy of the foregoing was sent via hand delivery to the following:

The Honorable Joseph L. Stirmer
Federal Communications Commission
Room 224
2000 L Street
Washington, D.C. 20554

Gary Schonman, Esq.
Hearing Branch
Mass Media Bureau
Federal Communications Commission
Room 7002
2025 M Street, N.W.
Washington, D.C. 20554



Merri Jo Outland